which she issued a bankruptcy notice. On an application by the debtor under section 1(1)(g) of the Bankruptcy Act, 1914, to have the bankruptcy notice set aside, it was held (Jenkins L.J. dissenting), that a claim under section 17 of the Married Women's Property Act, 1882, was capable of being a "cross-demand" within the meaning of paragraph (g); that, in the circumstances, the court should be satisfied that the debtor had a cross-demand which equalled or exceeded the amount of the judgment debt; and that, accordingly, the bankruptcy notice ought to be set aside. Roxburgh J. in the course of his judgment said that, for the purpose of satisfying section 1(1)(g) of the Bankruptcy Act, 1914, not every demand will suffice. The debtor must satisfy the court that he has a genuine demand, and further, that it has a reasonable probability of success.

We did not think that that case bears comparison with the case now under consideration. In our view, any counterclaim, set-off, or cross-demand set up by a debtor against the creditor must be in a liquidated sum or a money demand which is ascertainable with certainty as between the same parties and in the same right, as in ordinary actions. As pointed out by the creditor's counsel in the court below, Civil Suit No. 123 of 1963 had not been pursued and had not been set down for trial as the pleadings were still incomplete. Moreover, the debtor's claims in that civil suit were made by her and her son as partners against the creditor as a co-partner, so that any money due from the creditor could be recovered only in proceedings for the taking of accounts in accordance with the provisions relating to partnerships: see *Green* v. *Hertzog & Others.*[5] Without such accounts being taken under a proper order of court, it would be impossible to quantify the debtor's claims against the creditor. For the purposes of this appeal that was a sufficient answer.

The learned judge in the court below in stating his reasons for dismissing the debtor's application said in the course of his judgment:

"I dismissed the application to set aside the Bankruptcy Notice as I hold that the contention of the appellant that she has a cross-demand, set-off or counterclaim against the respondent exceeding the sum of $20,694.02 failed in that it was not one which is enforceable by her in her own right against the respondent and which further was indeterminate and uncertain."

With that reasoning of the learned judge we entirely agreed, and accordingly dismissed the appeal.

Appeal dismissed.

Solicitors: *Sharma & Co.; Lim, Lim & Oon.*

YONG MAY INN v. SIA KUAN SENG

[O.C.J. (Sharma J.) March 1, 1971]

[Malacca — Originating Summons No. 89 of 1970]

Infants — Guardianship — Application by mother for custody of children — Welfare of infants — Whether High Court can make order in guardianship proceedings for maintenance of infants — Married Women and Children (Maintenance) Ordinance, 1950 — Guardianship of Infants Act, 1961, s. 5.

The applicant, the mother of the infants, claimed the custody and care of three daughters born to her through her marriage with the respondent. There were disputes between the parties and the applicant and the children left the respondent. The girls were aged 12 years, 10 years and 8 years respectively.

Held: (1) taking everything into consideration, and above all the welfare of the children, it was best for them to remain in the guardianship of their own mother, the applicant;

(2) the court has jurisdiction to make an order for maintenance of the infants and in this case the respondent will be ordered to pay to the applicant a sum of $60 a month for the maintenance of the three children.

Cases referred to:-

(1) *In re McGrath* [1893] 1 Ch. 143 at p. 148.

(2) *Queen* v. *Gyngall* [1893] 2 Q.B. 232 at p. 248.

(3) *Wellesley* v. *Duke of Beaufort* 38 E.R. 236.

ORIGINATING SUMMONS.

S. C. Navaratnam for the applicant.

Ting Poi Teck for the respondent.

Cur. Adv. Vult.

Sharma J.: The applicant in these proceedings claims the custody and care of the three daughters born to her through her marriage with the respondent. The three children are: —

(1) Sia Yet Wah (f) — born in September 1958
(2) Sia Guek Yin (f) — born in November 1960
(3) Sia Yek Yen (f) — born in June 1962

The applicant in fact gave birth to another girl in April 1967 but that child has already been given in adoption and is not the subject matter of these proceedings.

The respondent is a goldsmith and is, according to his own evidence, now earning about $150 per month. He was, at the time of his marriage to the applicant in 1957, employed as an assistant in a goldsmith's shop at Merlimau. Now he runs his own business at Malacca. He lives in a house at Bachang and the three children live with him there. He leaves his house at 8.00 a.m. and returns home at 6.00 p.m. but on two nights every week he sleeps in his shop at Malacca. All the three children leave the house at about 7.30 in the morning to attend school. He can thus be with the children for about three to four hours a day in the evenings. The respondent has a mother aged about 58. She lives in the same house and shares the bedroom occupied by the children. There are two more rooms in the respondent's house. One room is occupied by the respondent's younger brother and the other by his younger sister both of whom are married.

It appears from the affidavit of the applicant that much of the trouble between the parties is attributable to the presence of the applicant's mother-in-law in the house and her disappointment at the failure of the applicant to present her with grandsons instead of granddaughters. It is unfortunate that this trouble should have spoilt the family life of the couple and have generated an atmosphere which could be far from conducive to the welfare of the family and the children. Whatever be the real cause of such disputes, discords and splits between the applicant and the respondent is not a matter into which I should go in these proceedings, although there are a number of allegations

and counter allegations in the two affidavits filed in this originating summons. I am primarily concerned with the welfare of the children.

The applicant has after her marriage to the respondent worked as a maid servant and is prepared to find employment as a maid servant again. She is at present staying with her father who is a sundry goods shopkeeper at Merlimau. She is assisting her father in the sundry goods shop. Her father is prepared to bring up and educate the children. There are schools at Merlimau. The children are now attending a school in or near Bachang. They are quite intelligent and doing fairly well in their studies. They also seem quite well looked after as far as food and clothing are concerned. I had the advantage of a long and a free and friendly conversation with them in my chambers.

Section 5 of the Guardianship of Infants Act 1961 enacts as follows: —

"*Subject to the provisions of section 10* the father of an infant shall be the guardian of the infant's person and property:

Provided that the court or a judge may make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent."

Section 10 of the same Act says: —

"The court or a judge may at any time remove from his guardianship any guardian, whether a parent or otherwise and whether of the person or the property of the infant, and may appoint from time to time another person to be guardian in his place."

The matters which have to be considered by the court in exercising its powers in the appointment or removal of a guardian are cited in section 11 of the Act and the court is required primarily to have regard to the welfare of the infant. In this particular case as the dispute is between the parents and not between a parent and another, the question of considering the wishes of the parent does not arise.

In the case of *In re McGrath*[1] Lindley L.J. delivering the judgment of the Court of Appeal said: —

"The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

The term "welfare" means that every circumstance must be taken into consideration and the court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do.

In *The Queen* v. *Gyngall*[2] Kay L.J. held that the jurisdiction of the court in cases like this is

"essentially a parental jurisdiction, and that description of it involves that the main consideration to be acted upon in its exercise is the benefit or welfare of the child. Again the term "welfare" in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration and the court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. It is impossible to give a closer definition of the duty of the court in the exercise of this jurisdiction."

The court is not so much concerned with the feelings of parents and natural guardians as with the welfare of the infants. The interest, well-being and happiness of the infants ought to be the main and paramount consideration in selecting the guardian of the person of a minor. Sentimental considerations should not be allowed to prevail against what is for the obvious welfare of the minor. What should be "for the welfare of the minor" must necessarily depend upon the facts and circumstances of each particular case.

Subject to the first and paramount consideration of the infant's welfare, a father has a natural jurisdiction over and a right to the custody of his legitimate child during infancy except that in the case of a daughter the right determines on her marriage under age. This right exists even as against the mother.

The three children whose custody and guardianship is the subject matter of these proceedings are 12, 10 and 8 years of age respectively and as I have already said they were with me in chambers for nearly an hour. During the course of my conversation with each of them it became apparent to me that all of them exhibited a deep hatred for their mother, the applicant. This seemed most unnatural and I can in the circumstances come to no other conclusion except that they seemed well tutored to say that they did not want to live with the applicant, their own mother. From the evidence which I have heard and which has been produced I can see no reason why the three girls should hate and loathe the applicant who gave them birth. If they were not tutored to say what they told me, then either the respondent or his mother must have been instrumental in instilling this deep-rooted dislike into the minds and hearts of these very young and tender children. I do not think it can at all be for their welfare that they should be brought up in such a poisoned atmosphere and be totally deprived of the affection which their mother can give them. They have a right to their mother's love and affection and no one can do what a mother can do for her children. It may be that it may take them some time to be rid of the evil effects of the fumes of poison which might have been slowly let into their beings but I have no doubt that with the passage of some time they will begin to feel happier and lead a more wholesome and fuller life. There can be no doubt that if they live with the mother they are going to be deprived of the company and the consequent discipline which a father's presence in the family brings. In this case, however, the respondent can be with the children for hardly more than three to four hours a day. I have taken into consideration the fact that the children may have to move to Merlimau and join some school there unless the applicant can get some job in Malacca or some other place. The applicant seems eager to work and bring up the children. I have no reason to think that they will in any way suffer even if they had to stay in the house of their grandparents at Merlimau. The children are all girls and although it is not absolutely essential that they should remain in the custody and care of their mother, they are bound to feel freeier in her company than in the company of their father and more particularly so when one of them is reaching an age when

she may need the advice of her mother most. I do not think that even Sia Yet Wah is old enough to form an intelligent preference. It is only if an infant has reached an age and maturity of understanding when he or she can make a proper and intelligent decision which can be the basis of that intelligent preference that his or her wishes should be taken into consideration. Such wishes, however, are not conclusive but only an important factor to be taken into account in reaching a decision. Any preference expressed by the minor is not to be accorded weight unless it is also intelligent. However, the court is not bound to ascertain from the minor in person his or her wishes as to his or her guardianship and where the minor is of a tender age, it may, in the exercise of its discretion, very well refrain from seeing and questioning him or her. Although the welfare of the minor is the first and paramount consideration, the court has to have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian, his or her nearness of kin to the minor, any existing or previous relations of the proposed guardian with the minor and an intelligent preference of the minor old enough to form it.

The applicant is quite prepared to live with the respondent if he sets up a separate home where only the applicant, the respondent and the children can live and where there is no interference from the respondent's mother. The respondent, however, is not prepared to live in a house without his mother, younger brother and younger sister. He does not even want the applicant to see the children in his house if she is granted only a right of access to them. I have given the matter careful consideration and spent some anxious hours in coming to a decision. Taking everything into consideration and above all the welfare of the children I have come to the conclusion that it is best for them to remain under the guardianship of their own mother, the applicant.

The applicant is also asking for her and the infants' maintenance. Mr. Ting, the learned counsel for the respondent, has contended that there is no provision in the Guardianship of Infants Act authorising the court to make an order for maintenance and that such an order can only be made under the Married Women and Children (Maintenance) Ordinance, 1950. Section 3 of the Guardianship of Infants Act provides as follows: —

"The guardian of the person of an infant shall have the custody of the infant and shall be responsible for its support, health and education."

It is clear that the court can exercise its jurisdiction under section 10 of the Guardianship of Infants Act, 1961 to appoint a guardian of the person of the minor even if he is possessed of no property. It is the duty of the father to maintain and educate his children who are incapable of supporting themselves and although the law has always recognised this duty, the court exercising its powers under the Guardianship of Infants Act seems to have no direct means of enforcing this obligation so as to compel him to maintain them out of property in which they have no interest. Lord Eldon L.C. in *Wellesley* v. *Duke of Beaufort*[3] observed:

"You may go to the Court of King's Bench for a *habeas corpus* to restore the child to its father; but when you have restored the child to the father, can you go to the Court of King's Bench to compel that father to subscribe even to the amount of five shillings a year for the maintenance of that child? A magistrate may compel a trifling allowance, but I do not believe that there was ever a *mandamus* from the court of the King's Bench upon such a subject. Wherever the power of the law rests with respect to the protection of children, it is clear that it ought to exist somewhere; if it be not in this court, where does it exist?... The courts of law can enforce the rights of the father, but they are not equal to the office of enforcing the duties of the father. Those duties have been acknowledged in this His Majesty's Court for centuries past."

There can be no doubt as to the full jurisdiction of the court in all questions relating to maintenance; it is a jurisdiction that can only be exercised where there is some property belonging to the infant (see *Simpson* on Infants). Lord Eldon in *Wellesley* v. *Duke of Beaufort*[3] continued to say: —

"It is not, however, from any want of jurisdiction that it does not act, but from a want of means to exercise that jurisdiction; because the court cannot take on itself the maintenance of all the children in the kingdom. It can exercise the jurisdiction usefully and practically only when it has the means of doing so; that is to say, by its having the means of applying property for the use and maintenance of the infants."

The Guardianship of Infants Act, 1961 is silent in this respect. The Married Women and Children (Maintenance) Ordinance, 1950 provides a mode for compelling the father to maintain his infant children, but under that Ordinance he cannot be compelled to educate them. It is true that where there is no specific provision in our statute the court has to act in accordance with the principles of justice, equity and good conscience and the rules of the Court of Chancery in England may form a safe and useful guide; but the power of allowing maintenance to minors such as is exercised by the Court of Chancery in England is, apart from any statute, exercised upon certain well-settled rules; an order cannot be made unless the minor possesses an estate, fund or income applicable to the purpose; the minor must have a vested interest in the fund.

Section 21 of the Guardianship of Infants Act, 1961 provides for the making of rules to carry the provisions of the Act into effect and other incidental matters arising out of such provisions. As far as I know no such rules have to date been framed. An application under the Married Women and Children (Maintenance) Ordinance, 1950 can only be made either to the sessions court or the court of a first class magistrate but section 8 of the Ordinance does contemplate of matters which may more conveniently be dealt with by the High Court and section 9 confers upon the High Court the same powers and jurisdiction which belong to and are exercisable by the sessions court or the court of a first class magistrate under the Ordinance. While it is true that under the Guardianship of Infants Act, 1961 the court can exercise its jurisdiction to appoint a guardian of the person of the minor even if he is possessed of no property, the Act does not say how, without the means, the guardian of the person can discharge his duty of bringing up the ward. Under English law there is no obligation on the guardian to

expend his own money on the maintenance of his ward. It may be that rules should be framed under section 21 of the Guardianship of Infants Act, 1961 but my own view (I may very well be wrong) in the situation as it stands is that when the court orders the appointment of a guardian of the person of a minor it should put the guardian in a position to support the minor. The applicant in this case cannot ask for her own maintenance in these proceedings. She can at the most, if the view which I have taken is correct, seek an order against the respondent for the maintenance of the three minor children.

The applicant will have the guardianship of the three minor children Sia Yet Wah, Sia Guek Yin and Sia Yek Yen who are ordered to be delivered into the custody and care of the applicant and the respondent will as from the 1st day of March, 1971 pay to the applicant a sum of $60 per month for the maintenance of the three minor children until further orders The respondent has his own goldsmith's business in a well known business locality of Malacca and I for one do not believe that his monthly income is only $150. The applicant is able to maintain herself. There will, of course, be liberty to the parties to apply. The respondent will have access to his children. He should make an application for the purpose to work out the details and I will hear that application in chambers.

The applicant will have the costs of this application.

Application granted.

Solicitors: *Koh Kim Leng & Co.; Ting Poi Teck & Co.*

SHANMUGAM v. PUBLIC PROSECUTOR

[O.Cr.J. (Mohamed Azmi J.) March 2, 1971]

[Kuala Lumpur — Criminal Application No. 4 of 1971]

Criminal Law and Procedure — Bail — Application for — Non-bailable offence — Rape — Offence punishable with death or imprisonment for life — Offer of marriage to victim — Not exceptional and special reason — Criminal Procedure Code (Cap. 6), ss. 388 & 389.

Penal Code, s. 376 — Rape — Application for bail — Exceptional and very special reasons.

This was an application by the accused for bail. He had been charged with the offence of rape, which was an offence punishable with imprisonment for life. Under section 388(i) of the Criminal Procedure Code (as amended by the Criminal Procedure Code (Amendment) Act, 1967), a president or magistrate has no power to grant bail in a case involving a non-bailable offence if there appears to be reasonable grounds for believing that the accused has been guilty of an offence punishable with death or with imprisonment for life. The president of the sessions court before whom the accused had been charged had refused bail. The principal ground of the application for bail was that the accused and the girl with whom the offence was alleged to have been committed wanted to get married.

Held: in this case the object of the application for bail was in effect to get the rape charge against the accused withdrawn, that is to frustrate or embarrass the criminal proceedings which were being taken against the accused. There were no exceptional or special reasons and therefore the application must be dismissed.

Cases referred to:-

(1) *Re K.S. Menon* [1946] M.L.J. 49.

(2) *R. v. Ooi Ah Kow* [1952] M.L.J. 95.

CRIMINAL APPLICATION.

M. Mahalingam for the applicant.

Mohamed Adnan bin Dato' Shuaib (Deputy Public Prosecutor) for the respondent.

Mohamed Azmi J.: This is an application under section 389 of the Criminal Procedure Code (F.M.S. Cap. 6) for an order for bail pending trial of the applicant.

The applicant was arrested on January 15, 1971 and charged in Kuala Selangor sessions court under section 376 of the Penal Code for rape against a girl aged 12 years old. He was charged in court on January 22, 1971 and the preliminary enquiry has been fixed on March 15, 1971. On the day he was charged, bail was applied for before the learned president, sessions court, but the application was refused. As the offence under section 376 of the Penal Code is punishable with imprisonment for life, I think the learned president was correct in refusing bail. In the case of *Re K. S. Menon*(1) where the provisions of section 388(i) of the Criminal Procedure Code were considered, it was held that the expression "punishable with death or penal servitude for life" should be read disjunctively as though it read "with death or with penal servitude for life". This decision was subsequently followed by Spencer Wilkinson J. in *R. v. Ooi Ah Kow.*(2) With the decision in these two cases, I fully agree, and with the coming into force of the Criminal Procedure Code (Amendment) Act, 1967 with effect from June 1, 1967, the position is that a president or a magistrate has no power to grant bail under section 388(i) in a case involving a non-bailable offence if there appears to be reasonable grounds for believing that the accused has been guilty of an offence punishable with death or with imprisonment for life.

Following the two cases which I have cited above, I am also of the opinion that for the present application to succeed, the applicant must show exceptional and very special reasons before the court should agree to exercise its discretion under section 389 of the Criminal Procedure Code. Relying on the affidavits filed by the elder brother of the applicant and the father of the girl, learned counsel for the applicant submitted the following grounds as exceptional and special reasons for the present application: —

(1) The applicant and the complainant are in love and they want to get married.

(2) The complainant being a minor cannot get married without the consent of her parent or guardian. In the present case, the complainant's father has given his consent and blessings to the proposed marriage.

(3) Unless the complainant gets married with the applicant, it will be difficult for her to find another